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No. 74-939

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In the Supreme Court
of the United States

OCTOBER TERM 1974

MAX A. QUICK,

Petitioner,

v.

WAYNE HANSEN,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No.....

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MAX A. QUICK,

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The petitioner prays that a Writ of Certiorari be issued to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this case on July 31, 1974. A Petition for Rehearing was timely filed and denied by an Order of that Court on November 1, 1974.

OPINIONS BELOW

The Order of Dismissal of the United States District Court for the District of Oregon, signed and filed on July 24, 1972, which has not been officially reported, is appended to this Petition as "Appendix D."

The District Court issued no formal opinion or findings, although the Order of Dismissal contains a few words in explanation of the Court's decision.

The Memorandum Opinion of the United States Court of Appeals for the Ninth Circuit, filed on July 31, 1974, is appended to this Petition as Appendix "C." The Judgment filed on the same day is appended as "Appendix B."

Petitioner filed a timely Petition for Rehearing and Suggestion for Rehearing in Banc, which was denied by an Order of the United States Court of Appeals for the Ninth Circuit filed on November 1, 1974. The Order, wihch contains a brief opinion, is appended to this Petition as "Appendix A."

JURISDICTION

The Judgment of the United States Court of Appeals for the Ninth Circuit was entered on July 31, 1974. A timely filed Petition for Rehearing and Suggestion for Rehearing in Banc was denied by that Court on November 1, 1974. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether a formal decision of the Federal Power Commission, entered pursuant to the Federal Power Act, 16 U.S.C. § 791(a) *et seq.*, that a waterway is a navigable waterway of the United States is binding

upon the Federal Courts where a litigant injured upon the waterway invokes the admiralty jurisdiction of the United States District Court.

STATUTES

Federal Power Act, 16 U.S.C. § 792:

"A commission is created and established, to be known as the Federal Power Commission (hereinafter referred to as the 'commission') which shall be composed of five commissioners who shall be appointed by the President, by and with the advice and consent of the Senate, one of whom shall be designated by the President as chairman and shall be the principal executive officer of the commission. Each chairman, when so designated, shall act as such until the expiration of his term of office. . . ."

Federal Power Act, 16 U.S.C. § 796:

"The words defined in this section shall have the following meanings for purposes of this chapter, to wit:

. . . . .

(8) 'navigable waters' means those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, and which either in their natural or improved condition notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallows, or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property

in interstate or foreign commerce, including therein all such interrupting falls, shallows, or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority;

. . . . ."

Federal Power Act, 16 U.S.C. § 797:

"The Commission is authorized and empowered —

. . . . .

(e) To issue licenses to citizens of the United States, or to any association of such citizens, or to any corporation organized under the laws of the United States or any State thereof, or to any State or municipality for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, or other project works necessary or convenient for the development and improvement of navigation and for the development, transmission, and utilization of power across, along, from, or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreigr nations and among the several States, or upon any part of the public lands and reservations of the United States (including the Territories), or for the purpose of utilizing the surplus water or water power from any Government dam, except as herein provided: *Provided*, That licenses shall be issued within any reservation only after a finding by the Commission that the license will not

interfere or be inconsistent with the purpose for which such reservation was created or acquired, and shall be subject to and contain such conditions as the Secretary of the department under whose supervision such reservation falls shall deem necessary for the adequate protection and utilization of such reservations: *Provided, further,* That no license affecting the navigable capacity of any navigable waters of the United States shall be issued until the plans of the dam or other structures affecting the navigation have been approved by the Chief of Engineers and the Secretary of the Army. Whenever the contemplated improvement is, in the judgment of the Commission, desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, a finding to that effect shall be made by the Commission and shall become a part of the records of the Commission: *Provided further,* That in case the Commission shall find that any Government dam may be advantageously used by the United States for public purposes in addition to navigation, no license therefor shall be issued until two years after it shall have reported to Congress the facts and conditions relating thereto, except that this provision shall not apply to any Government dam constructed prior to June 10, 1920: *And provided further,* That upon the filing of any application for a license which has not been preceded by a preliminary permit under subsection (f) of this section, notice shall be given and published as required by the provision of said subsection.

. . . . .

(f) To issue preliminary permits for the purpose of enabling applicants for a license hereunder to secure the data and to perform the acts required by section 802 of this title: *Provided, however*, That upon the filing of any application for a preliminary permit by any person, association, or corporation the Commission, before granting such application, shall at once give notice of such application in writing to any State or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in the county or counties in which the project or any part thereof or the lands affected thereby are situated."

Federal Power Act, 16 U.S.C. § 804:

"If the dam or other project works are to be constructed across, along, or in any of the navigable waters of the United States, the commission may, in so far as it deems the same reasonably necessary to promote the present and future needs of navigation and consistent with a reasonable investment cost to the licensee, include in the license any one or more of the following provisions or requirements:

(a) That such licensee shall, to the extent necessary to preserve and improve navigation facilities, construct, in whole or in part, without expense to the United States, in connection with such dam, a lock or locks, booms, sluices, or other structures for navigation purposes, in accordance with plans and specifications approved by the

Chief of Engineers and the Secretary of the Army and made part of such license.

(b) That in case such structures for navigation purposes are not made a part of the original construction at the expense of the licensee, then whenever the United States shall desire to complete such navigation facilities the licensee shall convey to the United States, free of cost, such of its land and its rights of way and such right of passage through its dams or other structures, and permit such control of pools as may be required to complete such navigation facilities.

(c) That such licensee shall furnish free of cost to the United States power for the operation of such navigation facilities, whether constructed by the licensee or by the United States."

Federal Power Act, 16 U.S.C. § 807:

"(a) Upon not less than two years' notice in writing from the Commission the United States shall have the right upon or after the expiration of any license to take over and thereafter to maintain and operate any project or projects as defined in section 796 of this title, and covered in whole or in part by the license, or the right to take over upon mutual agreement with the licensee all property owned and held by the licensee then valuable and serviceable in the development, transmission, or distribution of power and which is then dependent for its usefulness upon the continuance of the license, together with any lock or locks or other aids to navigation,constructed at the expense of the licensee, upon the condition that before taking possession it shall pay the net investment of the licensee in the project or projects

taken, not to exceed the fair value of the property taken, plus such reasonable damages, if any, to property of the licensee valuable, serviceable, and dependent as above set forth but not taken, as may be caused by the severance therefrom of property taken, and shall assume all contracts entered into by the licensee with the approval of the Commission. The net investment of the licensee in the project or projects so taken and the amount of such severance damages, if any, shall be determined by the Commission after notice and opportunity for hearing. Such net investment shall not include or be affected by the value of any lands, rights-of-way, or other property of the United States licensed by the Commission under this chapter, by the license or by good will, going value, or prospective revenues; nor shall the values allowed for water rights, rights-of-way, lands, or interest in lands be in excess of the actual reasonable cost thereof at the time of acquisition by the licensee: *Provided*, That the right of the United States or any State or municipality to take over, maintain, and operate any project licensed under this chapter at any time by condemnation proceedings upon payment of just compensation is expressly reserved.

(b) No earlier than five years before the expiration of any license, the Commission shall entertain applications for a new license and decide them in a relicensing proceeding pursuant to the provisions of section 808 of this title. In any relicensing proceeding before the Commission any Federal department or agency may timely recommend, pursuant to such rules as the Commission shall prescribe, that the United States exercise its

right to take over any project or projects. Thereafter, the Commission, if its [1] does not itself recommend such action pursuant to the provisions of section 800(c) of this title, shall upon motion of such department or agency stay the effective date of any order issuing a license, except an order issuing an annual license in accordance with the proviso of section 808(a) of this title, for two years after the date of issuance of such order, after which period the stay shall terminate unless terminated earlier upon motion of the department or agency requesting the stay or by action of Congress. The Commission shall notify the Congress of any stay granted pursuant to this subsection."

Federal Power Act, 16 U.S.C. § 811:

"The Commission shall require the construction, maintenance, and operation by a licensee at its own expense of such lights and signals as may be directed by the Secretary of the Department in which the Coast Guard is operating, and such fishways as may be prescribed by the Secretary of the Interior or the Secretary of Commerce as appropriate. The operation of any navigation facilities which may be constructed as a part of or in connection with any dam or diversion structure built under the provisions of this chapter, whether at the expense of a licensee hereunder or of the United States, shall at all times be controlled by such reasonable rules and regulations in the interest of navigation, including the control of the level of the pool caused by such dam or diversion structure as may be made from time to time by the Secretary of the Army; and for willful failure

[1] So in original. Probably should read "it."

to comply with any such rule or regulation such licensee shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be punished as provided in section 825 of this title."

Federal Power Act, 16 U.S.C. § 814:

"When any licensee cannot acquire by contract or pledges an unimproved dam site or the right to use or damage the lands or property of others necesasry to the construction, maintenance, or operation of any dam, reservoir, diversion structure, or the works appurtenant or accessory thereto, in conjunction with an improvement which in the judgment of the commission is desirable and justified in the public interest for the purpose of improving or developing a waterway or waterways for the use or benefit of interstate or foreign commerce, it may acquire the same by the exercise of the right of eminent domain in the district court of the United States for the district in which such land or other property may be located, or in the State court. The practice and procedure in any such action or proceeding for that purpose in the district court of the United States shall conform as nearly as may be with the practice and procedure in similar action or proceeding in the courts of the State where the property is situated: *Provided,* That United States district courts shall only have jurisdiction of cases when the amount claimed by the owner of the property to be condemned exceeds $3,000."

Federal Power Act, 16 U.S.C. § 817:

"It shall be unlawful for any person, State, or municipality, for the purpose of developing elec-

tric power, to construct, operate, or maintain any dam, water conduit, reservoir, power house, or other works incidental thereto across, along, or in any of the navigable waters of the United States, or upon any part of the public lands or reservations of the United States (including the Territories), or utilize the surplus water or water power from any Government dam, except under and in accordance with the terms of a permit or valid existing right-of-way granted prior to June 10, 1920, or a license granted pursuant to this chapter. Any person, association, corporation, State, or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States shall before such construction file declaration of such intention with the Commission, whereupon the Commisison shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interests of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, State, or municipality shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and if no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream upon compliance with State laws."

Constitution of the United States, Art. III, § 2:

"The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction. . . ."

STATEMENT OF THE CASE

On July 23, 1971, plaintiff filed a suit in admiralty in the United States District Court for the District of Oregon, alleging: "On or about June 22, 1968, this plaintiff was in the process of launching his motor boat in navigable waters of the United States in the Swift Creek Reservoir on the Lewis River in Skamania County, Washington and was standing in the water next to his boat when the defendant operated his boat into the person of . . . plaintiff" causing personal injuries for which plaintiff sought damages (R. 1, p. 1). The defendant, a citizen and resident of Oregon (R. I, p. 5), filed an answer admitting the plaintiff was struck by a motor boat on the day in question, but denied the remaining allegations of the complaint and alleged ". . . that at the time of the filing of said complaint, the statute of limitations for Oregon and Washington had run for the filing of actions for the damages alleged in plaintiff's complaint and that plaintiff is barred from recovery in this suit by reason of laches." (R. I, p. 2).

The pretrial order, which supersedes the pleadings of the parties in the District of Oregon, once again raised issues of lack of admiralty jurisdiction and laches (R. I, pp. 5, 6). These two issues were segre-

gated for trial (R. II, p. 2), and tried to the Court on May 22, 1972 (R. II, p. 2).

On July 24, 1972, the trial court entered an order of dismissal, stating ". . . that the plaintiff failed to prove the Lewis River was navigable where the accident occurred. Therefore this case is not covered by admiralty jurisdiction and must be dismissed. Having so found, I do not reach the issue of laches." (Appendix "D").

The plaintiff was injured when struck by defendant's motor boat at the upper end of Swift Creek Reservoir on the Lewis River in Skamania County, Washington (R. I, pp. 5, 9; R. II, pp. 42, 45). The Lewis River, a tributary of the Columbia River, has its head waters in the Mt. Adams wilderness area of the Gifford-Pinchot National Forest in southern Washington and flows westerly to its junction with the Columbia River near Woodland, Washington. From Woodland eastward, the river flows free for approximately 10 miles. Merwin Dam is located at this point, and backs up water for approximately 12 miles. East of the reservoir, the river flows free for a mile or two, where it is interrupted by Yale Dam. There is a reservoir about 10 miles long behind Yale Dam and the river then flows free of any obstruction for approximately three miles until it is backed up again behind Swift Dam. The backwater formed by Swift Dam is approximately 12 miles long (R. II, p. 2). There are thus three dams across the Lewis River, each backing up a reservoir of substantial length. Swift Dam is the

furthest upstream and backs waters of the Lewis River into Swift Creek Reservoir.

Yale Dam and Swift Dam were both constructed by Pacific Power and Light Company, a private utility (R. II, pp. 14-20; Pl. Ex. 1-A, 1-B, 5-A, 5-B, 6). Mr. E. Robert DeLuccia, who had been chief of the Bureau of Power of the Federal Power Commission, and who left the commission in 1951 to become vice president of Pacific Power and Light Company, and who, as chief of the Bureau of Power, processed license applications for the construction of hydroelectric projects, including Yale Dam, testified that the Commission considered the navigability of the Lewis River in issuing licenses to Pacific Power & Light Company to build both Yale Dam and Swift Dam (R. II, pp. 13-15, 18-20). The order of the Federal Power Commission issuing a license for construction of Yale Dam states that the dam is to be located "upon navigable waters and lands of the United States" (R. II, p. 18; Pl. Ex. 6, p. 4). The order is also set forth at 10 FPC 917, 919 (1951). The "Order Issuing License Major)" for Swift Dam was issued in 1956 and makes a specific finding that "the project will be located upon navigable waters and lands of the United States" (R. II, p. 20; Pl. Ex. 5-B, p. 4. See also, 16 FPC 1117, 1119 (1956). Licenses issued to Pacific Power & Light Company indicate that Yale Dam was constructed in or after 1951, and Swift Dam in or after 1956.

All of the above matters were called to the attention of the trial court and briefed before the United

States Court of Appeals for the Ninth Circuit.

In addition to showing that the Lewis River, at the place of plaintiff's accident, had already been declared navigable as a matter of law by the Federal Power Commission, plaintiff produced evidence, contradicted by the defendant, that the River was navigable in fact. The Lewis River, in the area where Swift Creek Reservoir is now located and below, consists of some sections of quiet water and other sections which are "quite steep" and rough. In its natural state, the depth of the river also varies a great deal from place to place (R. II, pp. 23, 34, 35).

A witness called by the plaintiff testified that cedar shingle bolts (pie-shaped wedges of log which are used for the manufacture of roofing shingles) had been floated down the river in large numbers "in the early 20's" (R. II, pp. 30-41). The sole witness called by the defendant conceded that this might have been done (R. II, p. 54). Under Washington law, as well as decisions of this Court, the stream would therefore be considered navigable in fact. *Monroe Mill Co.* v. *Menzel*, 135 Wash. 487, 77 P. 813 (1904); *State ex rel United Tanners Timber Co.* v. *Superior Court of Lewis County*, 60 Wash 193, 110 P. 1017 (1910); *Fortsen Shingle Co.* v. *Skagland*, 77 Wash. 8, 137 P.2d 304 (1913); *United States* v. *Appalachian Power Co.*, 311 U.S. 377 (1940).

It was also undisputed that following the construction of Swift Dam, commercial saw logs are sometimes floated across Swift Creek Reservoir from the

south side of the dam to the north side where a road is located (R. II, pp. 25, 26).

REASONS FOR GRANTING THE WRIT

This appeal presents an important, and undecided, issue of federal law: whether the Federal Courts may undertake a de novo trial of navigability in every case where admiralty jurisdiction is asserted by a litigant to recover for injuries or other activities occurring upon waterways which the Federal Power Commission, as an agency of the United States charged by Congress with the duty of determining such matters, has already found to be navigable.

Without the consent of counsel for either of the parties, this case was submitted to a panel of the United States Court of Appeals for the Ninth Circuit for decision without oral argument. The "Memorandum" affirmance issued by that Court completely overlooked petitioner's contention that re-examination of navigability of the Lewis River was precluded by the findings of the Federal Power Commission, although that issue had been briefed at length by counsel.

The oversight was called to the attention of the Court by a petition for rehearing. The "Order" denying the rehearing merely stated:

> "The Commission's determination regarding navigability was not dispositive in this suit. *See George* v. *Beavark*, 402 F.2d 977, 981 (8th Cir. 1968)."

George does not stand for the proposition claimed for it.

It is apparent that the United States Court of Appeals for the Ninth Circuit failed to give meaningful consideration to a serious and, as yet, unresolved, issue of federal law. Plaintiff believes that it is contrary to the policy of Congress and should be contrary to the policy of the courts to require relitigation of the issue of navigability, in cases where admiralty jurisdiction is asserted, for causes of action arising upon streams already adjudicated by the Federal Power Commission to be navigable.

Accidents involving pleasure craft are within the admiralty and maritime jurisdiction of the United States within the contemplation of *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972); *Oppen* v. *Aetna Insurance Co.*, 485 F.2d 252 (C.A. 9, 1973); *Kelly* v. *Smith*, 485 F.2d 520 (C.A. 5, 1973); and *St. Hilaire Moye* v. *Henderson*, 496 F.2d 973 (C.A. 8, 1974). *Contra*, *Crossen* v. *Vance*, 484 F.2d 840 (C.A. 4, 1973).

The Federal Power Commission was created by the Federal Power Act, 16 U.S.C. § 791 (a) *et seq.* See 16 U.S.C. § 792. The Commission is authorized by the Act to issue licenses for the construction of dams and other hydroelectric projects ". . . across, along, from or in any of the streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several States, or upon any part of the

public lands and reservations of the United States (including the Territories), or for the purpose of utiiizing the surplus water or water power from any government dam. . . ." 16 U.S.C. § 797 (e). The Act provides that upon the filing of any application for a preliminary permit for construction, the Commission, before granting the application, ". . . shall at once give notice of such application in writing to any State, or municipality likely to be interested in or affected by such application; and shall also publish notice of such application once each week for four weeks in a daily or weekly newspaper published in a county or counties in which the project or any part thereof for the lands affected thereby are situated." 16 U.S.C. § 797 (f). The granting of a license imposes heavy burdens upon the licensee and also awards substantial benefits. Among other things, the licensee may be required to build locks, booms, sluices or other structures for navigation purposes without cost to the United States, and may be required to convey to the United States, free of cost, land and rights of way for the purpose of construction of such navigation facilities by the United States. 16 U.S.C. § 804. The United States is also given the right to condemn the property without compensating the licensee for many of the elements of damage recognized in ordinary condemnation suits. 16 U.S.C. § 807. The licensee is required to provide navigation aids and facilities at its own expense. 16 U.S.C. § 811. On the other hand, the licensee is granted the power of eminent domain over private property necessary for use in execution of the license. 16 U.S.C. § 814.

The Federal Power Commission has both the authority and duty to adjudicate the navigability of a waterway. The Act provides (16 U.S.C. § 817):

> ". . . any person, association, corporation, state or municipality intending to construct a dam or other project works across, along, over, or in any stream or part thereof, other than those defined in this chapter as navigable waters, and over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, shall before such construction file declarations of such intention with the Commission, whereupon the Commission shall cause immediate investigation of such proposed construction to be made, and if upon investigation it shall find that the interest of interstate or foreign commerce would be affected by such proposed construction, such person, association, corporation, state or municipality, shall not construct, maintain, or operate such dam or other project works until it shall have applied for and shall have received a license under the provisions of this chapter. If the Commission shall not so find, and no public lands or reservations are affected, permission is granted to construct such dam or other project works in such stream, upon compliance with state laws."

"Navigable waters" is defined by the Act (16 U.S.C. § 796) to mean ". . . those parts of streams or other bodies of water over which Congress has jurisdiction under its authority to regulate commerce with foreign nations and among the several states, and which either in their natural or improved condi-

tion notwithstanding interruptions between the navigable parts of such streams or waters by falls, shallow or rapids compelling land carriage, are used or suitable for use for the transportation of persons or property in interstate or foreign commerce, including therein all such interrupting falls, shallows or rapids, together with such other parts of streams as shall have been authorized by Congress for improvement by the United States or shall have been recommended to Congress for such improvement after investigation under its authority."

The Federal Power Commission has determined that the Lewis River above Yale Dam and Swift Dam is navigable (Pl. Ex. 5-A, 5-B, 6). The Commission's "Order Issuing License (Major)" for the Swift Creek hydroelectric project contains the following finding:

> "The project will be located upon navigable waters and lands of the United States." (Ex. 5-B, p. 4).

The proceedings of the Federal Power Commission wtih respect to Yale and Swift Dams are reported at 10 F.P.C. 917 (Pl. Ex. 1-A) and 16 F.R.C. 1117 (Pl. Ex. 1-B).

So far as plaintiff's counsel have been able to determine, there are no cases which discuss the *res judicata* effect of the Commission's findings of navigability, and the Federal Power Act is silent, except by inference. The Act does provide that Federal District Courts must entertain eminent domain suits brought by licensees of the Commission. Because a finding of

navigability has serious permanent consequences under the Act for both the licensee and surrounding property holders, and because a license can be issued only after notice to interested parties and to the State in which the waterway lies, we suggest Congress intended that the findings of the Federal Power Commission should be considered conclusive unless set aside by a Federal Court on direct appeal. There is no reason for a Federal Court, in determining the private rights of private litigants, whose only interest in the Lewis River concerns a forum for litigation, to disregard findings of an agency which has primary authority over the navigable waters of the United States.

CONCLUSION

For the reasons set forth in this petition, the Court should accept certiorari, reverse the judgment of the Court of Appeals and remand the case to that Court for further proceedings.

Respectfully submitted,

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Max A. Quick

APPENDIX "A"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAX A. QUICK, Plaintiff-Appellant,	)	No. 72-2739
v.	)	
WAYNE HANSEN, Defendant-Appellee.	)	ORDER

Appeal from the United States District Court
for the District of Oregon

Before: BROWNING and CHOY, Circuit Judges, and
*WEIGEL, District Judge

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for a rehearing in banc. The Commission's determination regarding navigability was not dispositive in this suit. *See George* v. *Beavark*, 402 F.2d 977, 981 (8th Cir. 1968).

The full court has been advised of the suggestion for in banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

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* Honorable Stanley A. Weigel, United States District Judge, Northern District of California, sitting by designation.

APPENDIX "B"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAX A. QUICK, Plaintiff-Appellant,	)	No. 72-2739
v.	)	
WAYNE HANSEN, Defendant-Appellee.	)	DC No. 71-509

APPEAL from the United States District Court for the ..... District of Oregon.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the ..... District of Oregon and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is Affirmed.

Filed and entered July 31, 1974.

APPENDIX "C"

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAX A. QUICK, Plaintiff-Appellant,	)	MEMORANDUM
v.	)	
WAYNE HANSEN, Defendant-Appellee.	)	No. 72-2739

[July 31, 1974]

Appeal from the United States District Court
for the District of Oregon

Before: BROWNING and CHOY, Circuit Judges, and WEIGEL,* District Judge.

This is an appeal from the judgment of the district court dismissing the action for lack of subject matter jurisdiction. Appellant sued in admiralty to recover for personal injuries sustained in a boating accident on the Swift Creek Reservoir located on the Lewis River in the State of Washington. Appellee contested admiralty jurisdiction claiming that the accident did not occur on navigable waters.

A tort claim is within the admiralty jurisdiction of the federal courts provided that the wrong complained of occurred on navigable waters and bears a

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* The Honorable Stanley A. Weigel, United States District Judge for the Northern District of California, sitting by designation.

significant relationship to traditional maritime activity. *Executive Jet Aviation, Inc.* v. *City of Cleveland*, 409 U.S. 249 (1972). Navigability is a factual question—whether the body of water in question is used or susceptible of being used as a highway for commerce or transportation. *The Daniel Ball*, 77 U.S. 557, 563 (1870). The burden of proving navigability rests on the party invoking maritime jurisdiction. *In re River Queen*, 275 F. Supp. 403, 408 (W.D. Ark. 1967), *aff'd* 402 F.2d 977 (8th Cir. 1968).

The district court, following a hearing on the jurisdictional issue, ruled that appellant had failed to prove that the accident occurred on navigable waters. After reviewing the entire record in this case, we cannot say that the finding was clearly erroneous. Fed. R. Civ. P. 52(a); *McAllister* v. *United States*, 348 U.S. 19, 20 (1954).

AFFIRMED.

APPENDIX "D"

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

MAX A. QUICK, Plaintiff,	)	ORDER
v.	)	
WAYNE HANSEN, Defendant.	)	CIVIL 71-509

Plaintiff seeks to ground this case in federal admiralty jurisdiction. I find that plaintiff failed to prove the Lewis River was navigable where the accident occurred. Therefore this case is not covered by admiralty jurisdiction and must be dismissed.

Having so found, I do not reach the issue of laches.

IT IS SO ORDERED.

Dated this 24th day of July, 1972.

/s/ *Robert C. Belloni*
United States District Court Judge

FILED
FEB 20 1975

No. 74-939

In the Supreme Court
of the United States

OCTOBER TERM, 1974

MAX A. QUICK,

Petitioner,

v.

WAYNE HANSEN,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The opinions below are adequately set forth in the petition.

JURISDICTION

The jurisdictional elements are adequately set forth in the petition.

QUESTION PRESENTED

Respondent is satisfied with the question as presented in the petition.

STATUTORY PROVISIONS INVOLVED

The statutory provisions are adequately set forth in the petition.

STATEMENT

Respondent is satisfied with the statement insofar as it relates to the facts relevant to the question presented. The facts as they concern the question of whether or not the Lewis River is in fact navigable are incomplete, but will not be supplemented here because that question is not being presented to the Court.

ARGUMENT

Contrary to Petitioner's statement, the sole question presented here has been decided. The United States Court of Appeals for the Fourth Circuit has stated that a district judge is required to determine the question of navigability *de novo* on the record made at trial even though the Federal Power Commission may have made a finding on that question. *United States* v. *Appalachian Electric Power Co.*, 107 F.2d 769, 791 (4th Cir. 1939). The case was appealed to the Supreme Court where it was decided on other grounds. *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

The Court of Appeals pointed out that the Federal Power Act, 16 U.S.C.A., § 791, et seq., does not provide for a "hearing" but only for an "investigation" by the Commission, nor does it provide for any judi-

cial review of the findings made. At page 791 the Court stated:

> "Assuming that the finding of the Commission is a relevant fact for the consideration of the court, and that it is entitled to careful and respectful consideration of a body informed by experience, nevertheless it cannot properly be regarded as controlling judicial determination on the record in the case."

It is clear that there was no adjudication on the question of the navigability of the Lewis River in the area where the accident occurred until the Federal District Judge, affirmed by the United States Court of Appeals for the Ninth Circuit, decided that question against Petitioner.

There is no conflict in the decisions and there is no important question of federal law which has not already been decided.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this petition for writ of certiorari should be denied.

Respectfully submitted,

MORRISON, DUNN, COHEN,
MILLER & CARNEY

By .....
THOMAS H. TONGUE
Of Attorneys for Respondent

I hereby certify that I served the foregoing Respondent's Brief on Raymond J. Conboy, one of attorneys for Petitioner, on the day of February, 1975, by mailing to said attorney three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to said attorney for Petitioner at his address, to wit: 808 Standard Plaza, Portland, Oregon 97204, and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copy was mailed, there is a regular communication by U. S. Mail.

DATED this day of February, 1975.

MORRISON, DUNN, COHEN,
MILLER & CARNEY

By
THOMAS H. TONGUE
Of Attorneys for Respondent

FEB 24 1975
MICHAEL RODAK, JR., C

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REPLY BRIEF

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REPLY BRIEF

REPLY TO RESPONDENT'S ARGUMENT

Petitioner disagrees with respondent's analysis of *United States* v. *Appalachian Electric Power Co.*, 107 F.2d 769 (C.A. 4, 1939), reversed, *United States* v. *Appalachian Electric Power Co.*, 311 U.S. 377 (1940).

United States v. *Appalachian Power Co.* (the "New River" case) was a suit by the United States to enjoin a utility company which proposed to build a dam across the New River in defiance of a finding of the Federal Power Commission that the river was navigable, with its resulting requirement that the utility obtain a federal license before constructing the dam. The utility did not appeal the Commission's

finding of navigability, but instead disregarded it, compelling the United States to bring suit for the purpose of upholding the authority of the Commission. The District Court for the Western District of Virginia (23 F. Supp. 83) and the United States Court of Appeals for the Fourth Circuit both made *de novo* findings that the New River was not navigable, but were reversed by this Court, which held that the river was navigable.

This Court specifically reserved the issue of the effect to be given to the findings of the Federal Power Commission since ". . . the Government does not seek to have this Court pass on it in this case." (311 U.S. at 402, ftn. 7). The position of the United States was set forth in this Court's opinion as follows:

> "In both courts below the Government unsuccessfully urged that the findings of the Commission, if supported by substantial evidence, were conclusive. Although it still regards this contention as correct, the Government does not seek to have this Court pass on it in this case." (311 U.S. at 402).

The decision of the Court of Appeals had stated:

> "It is not disputed [i.e. by the United States] that the case can be judicially considered *de novo*, but it is said that the ordinary rule that findings of an administrative tribunal must be accepted, if supported by substantial evidence, must control a decision here on the facts."

Accordingly, far from approving by silence the decision of the Fourth Circuit on the weight to be

given findings of the Commission, this Court expressly reserved decision on that issue. It remains undecided.

In the case at bar, neither the State of Washington, the United States, the utility company which built Swift Dam, or property owners along the Lewis River challenged the finding of the Federal Power Commission that the Lewis River is a navigable waterway of the United States. The Respondent, an Oregon resident who injured the Petitioner while operating a pleasure craft on Swift Creek Reservoir, does not have an interest of sufficient importance to justify the Federal Courts in undertaking *any* review, either *de novo* or limited by a "substantial evidence" or other test, of the determination of the Federal Power Commission that the Lewis River is navigable. That issue was settled long ago among the parties and governments vitally interested and should be deemed settled as to those who subsequently engage in activities upon the waterway.

The decision of the United States Court of Appeals for the Ninth Circuit permits continuous relitigation of the issue of navigability of streams upon which huge hydroelectric dams have been constructed under major licenses issued by the Federal Power Commission.

CONCLUSION

For the reasons set forth in the Petition and in this Reply Brief, the writ of certiorari should be granted.

Respectfully submitted,

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RAYMOND J. CONBOY
Attorneys for Petitioner